No. 20999

IN THE

United States Court of Appeals For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY,
Appellant,

v.

JESSIE GIDDINGS THOMPSON,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE: JESSIE GIDDINGS THOMPSON

SORIANO & SORIANO
MILTON H. SORIANO
Attorneys for Appellee

Office and Post Office Address:
627 Colman Building
Seattle, Washington 98104

METROPOLITAN PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

TABLE OF CASES

STATUTES

IN THE

United States Court of Appeals For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, *Appellant,* v. JESSIE GIDDINGS THOMPSON, *Appellee*	No. 20999

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE: JESSIE GIDDINGS THOMPSON

LEGEND OF ABBREVIATIONS USED IN BRIEF

CT—Clerk's Transcript of record as prepared by Clerk of U.S. District Court.

Ex—Exhibit. Exhibits were offered only by plaintiff; none by defendant.

RT—Reporter's (Court) Transcript of evidence and proceedings in U.S. District Court (typewritten).

App. br.—Appellant's brief.

l.—line.

STATEMENT OF JURISDICTION

Appellee agrees with appellant that jurisdiction in this matter is vested in the United States Court of Appeals for the Ninth Circuit by virtue of 28 U.S.C.A. §1291. The United States District Court for the Western Dis-

trict of Washington, Northern Division, rightfully maintained jurisdiction based on 28 U.S.C.A. §1332. Appellant has met the procedural requirements necessary to appeal the cause.

APPELLEE'S COUNTER-STATEMENT OF THE CASE

1. Background of Litigation

Appellee Jessie Giddings Thompson is the surviving spouse of Ralph Everett Thompson, deceased. She is the named beneficiary under American Casualty Company of Reading, Pennsylvania, Group Policy No. AA17171 (Ex. 4), Certificate No. 169 (Ex. 3), issued July 1, 1962. The group policy insured union members of the International Organization of Masters, Mates and Pilots against injury or death caused by accidental means. Contractually, Ralph Everett Thompson's life was insured by enrollment under said plan in the amount of $25,000.00.

On March 28, 1964, Thompson became deceased. Subsequent thereto, his surviving wife qualified as executrix of Thompson's Last Will and Testament. Included in the estate were accidental death insurance policies. One was with Traveler's Insurance Company and the second with American Casualty Company of Reading, Pennsylvania, hereinafter referred to as "American." Pursuant to contract, Proofs of Loss were submitted to the proper representatives of each company. Traveler's Insurance Company paid the accidental death benefits to the beneficiary in the amount of $5,000.00. In approximately the month of July or August, 1964, it was learned by the beneficiary's attorneys that a merger had been effectuated between appellant and American or that appellant

had purchased American. Demands were made of appellant's representatives and after a considerable length of time, appellant denied appellee's claim. Appellee commenced suit and filed the same November 3, 1964 (CT 1).

2. Summary of Facts

On March 27, 1964, Ralph Everett Thompson was employed in the capacity of Third Officer on board the vessel SS CHENA. The vessel is owned and operated by Alaska Steamship Company, a Washington corporation. She is a Liberty-type vessel which was reconditioned for the hauling of vans in the Alaska trade. Thompson, aged 47, was married and resided with his wife on a farm outside Monroe, Snohomish County, State of Washington. He was a competent deck officer, well capable of performing his duties. At the time of Thompson's demise, he was free of infirmities and appeared in excellent health. His death resulted from the trauma sustained during the Alaskan Good Friday earthquake, March 27, 1964. Thompson went into shock and became deceased on March 28, 1964.

The magnitude of the earthquake would be described as horrible and devastating. The SS CHENA was moored to its dock in Valdez, Alaska. At approximately 5:31 p.m., Alaska Standard Time, the earthquake struck. The vessel was tossed about by tremendous tidal waves; stevedores were killed by tumbling cargo and ship's paraphernalia. Humans were buried alive in chasms created by the quake, and the entire dock and warehouse facility was destroyed.

Thompson, as cargo watch officer, was obliged to resume his duties on the bridge of the vessel at the outset

of the earthquake. While in the performance of his duties, Thompson went into shock. He never recovered from said condition and succumbed at 7:45 a.m., Alaska Standard Time, the morning of March 28, 1964.

Evidence submitted to the jury at the time of trial clearly established that Thompson met his death due to bodily injury caused by accidental means.

SUMMARY OF ARGUMENT

1. Thompson's death was within the purview of the insurance contract.

2. The insured's death resulted directly and independently of all other causes from "bodily injury" caused by accident within the terms of the policy.

3. The only witnesses before the jury were appellee's. There could not possibly have been conjecture or speculation on the part of the jury. Appellant's position that cross-examination in the realm of generalities produced plausible explanations of Thompson's death is not logically founded, but was considered by the jury.

4. The death of Thompson was accidentally caused while he was working as third officer on board the SS CHENA at Valdez, Alaska; that his injury occurred three minutes after the commencement of the Good Friday earthquake and the injury occurred as described—"Shock caused by earthquake."

ARGUMENT

Cause of Death

The certificate of death (Ex. 1) signed and recorded April 16, 1964, set forth the cause of death as acute

myocardial infarction due to earthquake. The condition which gave rise to the underlying cause was the earthquake. There were no other significant conditions contributing or relating to Thompson's death. The certificate sets forth the circumstances as being an accident, wherein Thompson was injured at 5:34 p.m., March 27, 1964, while at work and described the injury as shock caused by earthquake. Also please refer to the Proof of Death, Physician's Statement No. 1 (Ex. 8), completed by Dr. Davis and submitted to American Casualty Company of Reading, Pennsylvania, by the surviving spouse. Dr. Davis further expressed the acute myocardial infarction as being immediate and caused by the stress of the Good Friday earthquake.

Dr. Davis attended the deceased during the evening of March 27, 1964. When he first observed the patient, Thompson was very pale; he was perspiring and his pulse was rapid (RT p. 155, ll. 3-15). Dr. Davis further testified that the cause for Mr. Thompson's state of shock was fright due to the earthquake (RT p. 157, ll. 16-23). The doctor categorized Thompson's condition as psychic trauma. Thompson was unable to compensate reality due to his condition (RT p. 159, ll. 6-16). Dr. Davis testified, in his opinion, had it not been for the earthquake of March 27, 1964, Thompson would not have experienced the shock condition. The psychic trauma experienced by Thompson became an unsurmountable barrier which had the effect of overloading Thompson's heart (RT p. 167, ll. 14-25; p. 168, ll. 1-2).

One of the leading psychiatrists in the Seattle area, Dr. Glen T. Strand, was called as an expert witness by appellee. He was asked what effect fright could produce.

His statement to the jury and to the court was categorical that fright could kill a person (RT p. 281, ll. 19-25; p. 282, ll. 1-4). Further, the jury was informed by Dr. Strand that fright is the most prevalent cause of shock; that fright itself would produce bodily injury (RT p. 295, ll. 24-25; p. 296, ll. 1-2, ll. 23-25; p. 297, ll. 2-22).

Considerable mention has been made in appellant's brief that the deceased was emotionally disturbed due to the explosion of the SS BUNKER HILL and the subsequent loss of said vessel and a number of the officers employed on board her. It was admitted in appellant's brief that the deceased, while serving on board the SS CHENA, was a very capable and competent ship's officer. The master of the SS CHENA, Merrill Stewart, the chief officer, Neil Larsen, and the chief engineer, Chester Leighton, all testified in concert that Thompson performed his officer's duties capably and without restriction of any sort. It would be certain that an explosion such as experienced on board the BUNKER HILL would be a topic of conversation and that the loss of friends and shipmates would be disturbing to any normal person. In light of that, the chief officer, Neil Larsen, who was most closely associated with Thompson, testified that Thompson brought up the subject of the loss of the BUNKER HILL and his friends infrequently (RT p. 132, ll. 6-17). In fact, politics seemed to be the topic of conversation.

Chester Leighton, chief engineer, in his deposition, stated that Thompson discussed the BUNKER HILL incident quite often after it happened (RT p. 198, ll. 11-12). Leighton also testified that he was not well acquainted with the deceased.

The master of the CHENA, Merrill Stewart, testified that he had heard Thompson discuss the BUNKER HILL on only *one* occasion, while the officers were having dinner (RT p. 71, ll. 12-21).

A theory that Thompson was disabled due to the BUNKER HILL incident was pure conjecture and speculation. On the basis of the record it would appear that appellant's theory was a subterfuge considered by the jury and the jury determined that the explosion of the BUNKER HILL had no causal effect upon Thompson's physical condition on the 27th day of March, 1964. The master succinctly testified that Thompson went into shock due to fright. That the fright was consistent with the magnitude of the earthquake and all persons aboard the CHENA, together with most persons in the vicinity, were very much frightened by the experience (RT p. 55, ll. 3-5).

Words Used in the Insurance Policy Were Construed by the Jury According to Their Ordinary Meaning.

The trial court instructed the jury (RT p. 373, ll. 21-25; p. 374, ll. 1-7) as follows:

> "The plaintiff would be entitled to recover under said policy only if you find that Mr. Thompson's death resulted from a cause insured against within the reasonable contemplation of the parties as expressed by the language of the policy.
>
> "In construing the contract, or policy of insurance, the terms and words used therein usually should be given their *ordinary meaning* as they are *commonly used* and understood. The law presumes that the parties understood the import of their contract and that they intended to be bound by the language of the policy." (Emphasis supplied)

In *Ames v. Baker,* 68 W.D.2d 709, the court pronounced the rule as follows:

> "It is well established that the language of an insurance policy should be interpreted in accordance with the way it would be understood by the average man purchasing insurance. *Zinn v. Equitable Life Ins. Co.,* 6 Wn.2d 379, 107 P.2d 921 (1940). Nice distinctions and refinements are not favored. Rather than interpreting the policy in a technical sense, the court should interpret the policy in accordance with its ordinary meaning. *Thompson v. Ezzell,* 61 Wn.2d 685, 379 P.2d 983 (1963), and authorities cited. Words used in a policy of insurance should be given their common, ordinary meaning, rather than that of the lexicographers or of those skilled in the niceties of the language. 13 Appleman, *Insurance Law and Practice,* §7384 (1943)."

Insurance Contract Is Interpreted in Favor of the Insured.

Further, in *Ames v. Baker, supra,* at page 710 the court stated as follows:

> "Finally, even if the intentions of the insurer and the insured do not coincide and even if defendant's interpretation is arguably plausible, rendering the policy capable of two interpretations, the judgment must nevertheless be affirmed. When a policy is fairly susceptible of two different interpretations, that interpretation most favorable to the insured must be applied, even though a *different meaning* may have been intended by the insurer. *Thompson v. Ezzell, supra; Selective Logging Co. v. General Cas. Co. of America,* 49 Wn.2d 347, 301 P.2d 535 (1956)." (Emphasis supplied)

The jury acted on the instructions of the trial judge and concluded that fright caused bodily injury to Thompson within the terms of the insurance policy.

Appellee, in her trial memorandum, cited the case of *Pierce v. Pacific Mutual Life Insurance,* 7 Wn.2d 151,

109 P.2d 332 (1941). The court in that case applied the words *"Physical injuries"* rather than *"bodily injuries."* It is submitted that physical injuries by its dictionary definition means the same.

The courts have held that the death or injury of a person may result from shock, fright or other psychic trauma despite absence of physical impact by the insured's body and a force causing death or injury. In the case of *Pierce v. Pacific Mutual Life Ins. Co., supra,* the Washington Supreme Court found that where an attorney who suffered a cerebral hemorrhage as a result of being confronted with another vehicle approaching him in his traffic lane, was permitted recovery under a policy insuring against disability sustained "solely through accidental means." The Washington State Supreme Court noted that excitement, fright and sudden physical exertion, and other mental, emotional or physical activity have the effect of raising a person's blood pressure, and that the injuries then and there sustained by him [Pierce] were sustained through accidental means. In certain instances, recovery has been permitted where the insured was a mere witness to the events alleged to have been the stimulus producing the shock, fright, or psychic trauma resulting in death. The case of *Fairclough v. Fidelity & Casualty Co.,* 54 App. D.C. 286, 297 F. 681 (1924), the Appellate Court noted that the insured's fall resulted from "Psychic shock" or a faint produced by temporary nervous derangement brought on by fear or fright. They further ruled that if the jury had found such to be the fact, the vertigo would not have barred recovery upon the policy.

The testimony in this case indicated that Thompson was sympathetic in nature. That the catastrophe follow-

ing the earthquake and the ensuing tidal waves caused him to go into deep shock from which he never recovered.

In the case of *International Travelers' Association v. Branum* (1914, Tex. Civ. App.), 169 SW 389, the court rejected the theory that plaintiff did not die from accidental means. The court held that great excitement was capable of producing death from cerebral hemorrhage.

In the *Pierce* case, *supra,* the court reviewed the question as to whether fright or shock suffered by the insured was the sole proximate cause of his injury and resulted directly, independently and exclusively of all other causes in his disability within the provisions of the policy. The Washington State Supreme Court found that in such cases the injury should stand out as the predominant factor in the production of the result and held that while the insured may have had a diseased condition which deprived him of the normal power of resistance to the effects of undue strain or fright and such condition may have been necessary to the result, the insured's pre-existing condition did not necessarily deprive the strain or fright he suffered or its character as the predominant factor in the production of the cerebral hemorrhage so as to preclude recovery under the policy.

Appellant cited *Pan American Life Insurance Company v. Andrews,* 340 S.W.2d 78 (1960), (App. Br. p. 21). It is interesting to note that the *Branum* case *supra,* was not overruled here. In the *Andrews* case, Washington's *Pierce* case was cited and *distinguished.* (Emphasis supplied.) In the *Andrews* case, the policy stated that "This supplemental contract does not cover death resulting from:

> "(a) Bodily injuries of which there is no visible contusion or wound on the exterior of the body, except

in the case of drowning or internal injury revealed by autopsy . . ."

In the instant case there were no qualifying clauses setting forth or restricting the nature of the injury. The jury was instructed to contemplate whether or not a bodily injury was sustained by Thompson as a result of the Good Friday earthquake. It deliberated that Thompson sustained bodily injury which caused Thompson's death.

In distinguishing the various cases involving psychic trauma, the courts have alluded to the difference between imminent danger to life, as against loss of property, and further, the question of whether or not the insured has been voluntarily or involuntarily subjected to the element of psychic trauma. In the *Pan American Life Insurance Company v. Andrews, supra,* the Texas Supreme Court concluded that the deceased insured voluntarily had witnessed a fire which was destroying his property; that he had no personal danger and suffered no fright. In fact, the insured was not in the building at the time of the fire.

Jury Did Not Indulge in Speculation or Conjecture.

The appellant contends that it was error for the court's failure to give appellant's Instruction No. 10 (RT p. 388, ll. 4-25; p. 389, ll. 1-12). The trial court explained the instructions and further stated that the instruction as proposed by appellant was not analogous. Testimony and exhibits alleviated conjecture and speculation. As set forth in appellee's brief, the only speculation or conjecture that could have been entertained by the jury would be in weighing the collateral matters suggested by appellant while arguing its case and cross examining the witnesses.

Trial Court Could Not Grant a New Trial or Judgment N.O.V.

The Supreme Court of the State of Washington has followed the federal rule and has set forth the test to be applied in the granting or denying of a motion for new trial and/or a judgment N.O.V. *Bunnell v. Barr,* 68 W.D.2d 764; at page 767 the court stated:

> "It is axiomatic that we, as is the trial court, are bound to the rule that in considering the issues raised by a motion for new trial the evidence of the nonmoving party must be accepted as true and, together with all reasonable inferences that may be drawn therefrom, be interpreted in a light most favorable to that party. *Davis v. Early Constr. Co.,* 63 Wn.2d 252, 386 P.2d 958 (1963). Likewise, we are cognizant of the principle that, except where questions of law are involved, the trial court is invested with broad discretion in granting or denying motions for new trial, and that the trial court's determination will not be disturbed on appeal absent an abuse of discretion. *Cyrus v. Martin,* 64 Wn.2d 810, 394 P.2d 369 (1964); *Sargent v. Safeway Stores, Inc.,* 67 W.D.2d 933, 410 P.2d 918 (1966). This latter principle, however, does not constitute a license for the trial court to weigh the evidence and substitute its judgment for that of the jury, simply because the trial court disagrees with the verdict. *Knecht v. Marzano,* 65 Wn.2d 290, 396 P.2d 782 (1964)."
>
> "The basic underpinning of the trial court's action in granting a new trial in the instant case is found in the principle, announced in *Mouso v. Bellingham & No. Ry.,* 106 Wash. 299, 303, 179 Pac. 848 (1919) to the effect that:
>
> " '[W]here the physical facts are uncontroverted and speak with a force that overcomes all testimony to the contrary, reasonable minds must follow the physical facts,'
>
> "This rule, however, does not apply when the physical facts in evidence go no further than to simply cast

doubt upon the credibility of a witness or a party. *Shephard v. Smith,* 198 Wash. 395, 88 P.2d 601 (1939). On the contrary, to properly apply the rule, the physical facts in evidence must not only be undisputed, they must also be consistent with each other and, when taken together, be manifestly irreconcilable with the countervailing oral testimony. In short, the established and undisputed physical facts must be such as to irresistably lead reasonable minds to but a single conclusion."

CONCLUSION

On the basis of the evidence, appellee considered that she was entitled to a directed verdict. The trial court apparently felt that the matters introduced by appellant through cross examination would perhaps cause reasonable minds to differ. Instructions covering the entire case were given to the jury. After deliberation, the jury concluded the verdict for the plaintiff (appellee).

Respectfully submitted,

SORIANO & SORIANO
MILTON H. SORIANO
Attorneys for Appellee

CERTIFICATE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and, that in my opinion the foregoing brief is in full compliance with those rules.

MILTON H. SORIANO
Of Attorneys for Appellee